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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION TWO**

In re D.U., a Person Coming Under the
Juvenile Court Law.

RIVERSIDE COUNTY DEPARTMENT
OF PUBLIC SOCIAL SERVICES,

Plaintiff and Respondent,

v.

ALICIA U. et al.,

Defendants and Appellants.

MASTER FILE E039224 &
E039996

(Super.Ct.No. RIJ 110067)

OPINION

APPEAL from the Superior Court of Riverside County. Becky Dugan, Judge.
Reversed.

Law Offices of Arthur J. LaCilento and Arthur J. LaCilento for Defendants and
Appellants.

Joe S. Rank, County Counsel, and Julie Koons Jarvi, Deputy County Counsel, for
Plaintiff and Respondent.

Robert Wayne Gehring, under appointment by the Court of Appeal, for Minor.

Paternal grandparents (grandparents) of D.U. appeal from a juvenile court order denying their motion for de facto parent status as to their granddaughter (born in 2000). In a subsequently filed appeal in this case, grandparents also challenge the juvenile court's order denying their Welfare and Institutions Code section 388 petition.¹ This court consolidated both appeals for purposes of briefing, oral argument, and this decision.

Grandparents contend the juvenile court abused its discretion in denying their motion for de facto parent status and their section 388 petition. Grandparents argued in their section 388 petition and on appeal that there were changed circumstances and that, as D.U.'s legal guardians, they were denied due process rights to notice, to be heard, and to receive reunification services.

We conclude the court abused its discretion in denying grandparents' motion for de facto parent status. Grandparents qualified as de facto parents. Since the juvenile court erred in not hearing and granting grandparents' motion for de facto parent status before making a disposition ruling, the order denying grandparents' motion for de facto parent status is reversed, as well as the disposition order, and the matter is remanded to the juvenile court with instructions to grant grandparents de facto parent status and then conduct a new dispositional hearing in which grandparents are permitted to assert their interests in having D.U. placed with them. Grandparents' other contentions are moot.

¹ Unless otherwise noted, all statutory references are to the Welfare and Institutions Code.

1. Factual and Procedural Background

Juvenile dependency proceedings concerning D.U. began with DPSS filing on August 17, 2005, an out of custody juvenile dependency petition under section 300, subdivisions (b) and (g). The petition alleges that D.U. was at risk of harm due to mother's failure or inability to supervise, protect, and care for D.U. due to her mother abusing drugs, failing to rehabilitate during prior juvenile dependency proceedings concerning her other children, and suffering from mental health problems. Mother admitted smoking methamphetamine and marijuana when she was pregnant with two of her other children and that she tended to abuse drugs when she was depressed.

A juvenile dependency action was already pending as to two of mother's other children, J.P (born in 2004) and A.A. (born in 2005).² These children do not share the same father as D.U. An out of custody petition concerning D.U.'s siblings was filed in April 2005, as a consequence of mother and A.A. testing positive for drugs at the time of A.A.'s birth. D.U. was not named in the petition filed in April because she was not living with mother at the time. When D.U. was 10 months old, at mother's request, grandparents began caring for D.U. D.U. lived with grandparents continuously since then for the past four years. D.U.'s father was in prison and was not expected to be released from prison until 2007.

In May 2005, the probate court granted grandparents temporary guardianship of D.U. pending a hearing on a petition for appointment of a general guardian. In

² Mother also has another child (born in 1998), who lives with the child's father. D.U.'s siblings are not parties to this appeal.

connection with the guardianship petition, a probate investigator conducted an investigation, which included interviewing grandparents on June 20, 2005. The investigation report was filed with the court. The guardianship hearing was scheduled for July 1, 2005, but continued to September.

The probate investigator recommended in the report that the matter be referred to the DPSS for further investigation because the investigator was concerned about D.U. living with grandparents while one of their sons (uncle) was being investigated for committing murder on June 9, 2005. According to the probate investigator, uncle was involved in a love triangle and murdered the other man in Murrieta. He had lived with grandparents in Perris up until that time and then absconded, with the help of his sister, who drove him to the border. Grandparents stated they did not believe he would return to their home and were shocked he was wanted for murder. The investigator concluded in her report that grandparents appeared to have taken good care of D.U.

In the jurisdiction/disposition addendum report filed on July 21, 2005, concerning D.U.'s siblings' dependency case, the social worker stated mother was no longer working; had delayed beginning a substance abuse program and parenting classes; and had failed to attend therapy and reschedule a missed therapy session. Nevertheless, the social worker recommended D.U.'s siblings continue to reside with mother since they appeared to be well cared for. As to D.U., the social worker mentioned that grandparents had been granted temporary guardianship of D.U. while Child Protective Services (CPS) completed a Probate Code section 1513, subdivision (c) report required in the guardianship proceedings. The report had not yet been completed.

The social worker further stated in the addendum report that the grandparents' son (D.U.'s uncle) was wanted for murder, was on the run, and was hiding from the police. The social worker stated: "According to information obtained from the probate investigator there was a family meeting shortly after the murder to determine where the son should go and what he should do with the gun. The suspect's sister drove the suspect to the Mexico border and dropped him off. The sister was subsequently arrested." The grandparents were not arrested or charged with any offense. The social worker reported that mother said she feared for D.U.'s safety in the event uncle returned to grandparents' home feared that grandparents would take D.U. out of the country, and had decided she wanted custody of D.U.

On August 12, 2005, a DPSS social worker told grandparents that D.U. was to be placed with mother. Thereafter, for six days D.U. lived with mother but spent most all of her waking hours at grandparents' home.

On August 18, 2005, the day after DPSS filed a juvenile dependency petition concerning D.U., DPSS removed D.U. and her siblings, J.P. and A.A., from mother's home and placed them in foster care because of mother's substance abuse.

On August 22, DPSS filed an amended petition alleging new allegations that mother still had not rescheduled her substance abuse counseling appointments, had not enrolled or participated in any parenting course or substance abuse program, and had not drug tested, as required, four times. It was believed that mother was continuing to abuse drugs. When a social worker went to visit mother on August 18, 2005, she appeared to

be under the influence of drugs. The children were removed at that time from mother's care.

On August 22, grandparents filed a motion for de facto parent standing. Grandparents' supporting declaration stated that they had been D.U.'s primary caretakers since she was 10 months old and had been granted temporary legal guardianship over her on May 6, 2005. Pending the hearing on the guardianship petition, a probate investigator investigated the matter and then the guardianship matter was referred to the DPSS for further evaluation. The probate investigator stated in her report that D.U. was content and well cared for by grandparents, and said she wished to live with grandparents. The investigator said she was concerned that D.U.'s uncle, who had been living with grandparents, was wanted for murder. Grandparents believed he would not return to their home, and in the event he did, they had arranged for an attorney to assist him in turning himself in. Grandparents had cooperated with the police in connection with the criminal murder investigation.

DPSS opposed the motion, arguing there was no evidence grandparents satisfied any of the factors pertinent to determining de facto parent status, and in particular, they had failed to provide D.U. with a safe, wholesome environment as a consequence of grandparents' son being wanted for murder and the family helping him flee.

On August 23, the court held a detention hearing and ordered D.U. detained in foster care. A contested jurisdiction/disposition hearing was set on the same day as the hearing on grandparents' motion for de facto parent status.

According to the jurisdiction/disposition addendum report, filed August 26, D.U. cried at night after first being removed but was doing better and was no longer crying. She had daily telephone conversations and weekly supervised visits with grandparents, which went well.

On October 11, 2005, the court held a contested jurisdiction/disposition hearing and also heard grandparents' motion for de facto parent status. The court found jurisdiction over D.U., and ordered her care, custody, and control to be placed with the DPSS. The court ordered D.U. placed outside her parents' home, in suitable relative care, foster care, or another suitable facility.

After hearing oral argument, the court denied grandparents' motion for de facto parent status, stating that grandparents had not provided D.U. with a safe, wholesome home environment as a consequence of grandparents' adult children all being criminals and uncle being wanted for murder and on the run. Grandparents filed a notice of appeal of the order.

On January 11, 2006, grandparents filed a section 388 petition alleging changed circumstances and requesting the court to set aside the order on October 11, 2005, in which the court refused to place D.U. with grandparents, and either order D.U. placed with them or order increased visitation and reunification services. Grandparents alleged the changed circumstances consisted of uncle and D.U.'s father not living in grandparents' home; uncle not having any contact with grandparents, and if he did in the future, they would attempt to have him surrender to the authorities; and D.U. wanting to return to grandparents' home.

The juvenile court summarily denied grandparents' section 388 petition without a hearing on January 11, 2006, on the ground the petition did not state any new evidence or a change of circumstances. Grandparents filed a notice of appeal of the order denying their petition. This court consolidated both of grandparents' appeals.

2. Grandparents' Motion for De Facto Parent Status

We review the denial of a de facto parent application for abuse of discretion. (*In re Michael R.* (1998) 67 Cal.App.4th 150, 155.) Ordinarily, there is no abuse of discretion if the court's order is supported by substantial evidence. (*Ibid.*) To make that determination, we review the entire record, viewing the evidence in the light most favorable to the court's ruling. We determine whether, viewed in that light, the evidence supports the court's exercise of discretion. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351.) We determine also, however, whether the court applied the correct legal principles governing applications for de facto parent status. ““Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an ‘abuse’ of discretion.” [Citations.]” (*Thayer v. Wells Fargo Bank* (2001) 92 Cal.App.4th 819, 833.) We conclude in the instant case that the evidence does not support the denial of grandparents' motion for de facto status and that the court's order was therefore an abuse of discretion.

A de facto parent is “a person who has been found by the court to have assumed, on a day-to-day basis, the role of parent, fulfilling both the child's physical and psychological needs for care and affection, and who has assumed that role for a substantial period.” (Cal. Rules of Court, rule 1401(a)(8).) A nonparent who has

undertaken the parental role, raising the child in his or her own home, may, in time, acquire a legally protected interest in the companionship, care, custody and management of the child. (*In re Kieshia E.* (1993) 6 Cal.4th 68, 75.) Moreover, a person who has achieved a close and continuing relationship with a child is likely to have unique knowledge about the child and his or her needs which can contribute to the court's ability to fashion a disposition which is in the child's best interest. Because a de facto parent has both a protected legal interest in the child, and a unique ability to contribute to the achievement of the objectives of dependency law, de facto parents become full parties, entitled to be represented by counsel and to present evidence. (*Id.* at pp. 75-76, 77-78; *In re Cynthia C.* (1997) 58 Cal.App.4th 1479, 1490-1491.)

“[T]he key to the privileged status of de facto parenthood is adherence to ‘the role of parent,’ both physical and psychological. [Citations.]” (*In re Kieshia E.*, *supra*, 6 Cal.4th at p. 78.) Therefore, a person who otherwise meets the description of de facto parent may be denied that status if he or she has “betrayed and abandoned, not embraced,” the role of parent by inflicting harm on the child or by exposing the child to a risk of serious harm. (*Ibid.*; *In re Michael R.*, *supra*, 67 Cal.App.4th at pp. 157-158.) Stated another way, when a nonparent caretaker commits a “substantial harm,” i.e., a harm which is “fundamentally at odds with the role of a parent,” that person has no right to de facto parent status. (*In re Vincent C.* (1997) 53 Cal.App.4th 1347, 1356-1357.) Conversely, if the caretaker has not committed any substantial harm, and if factors supporting de facto parent status are present -- the child is psychologically bonded to the caretaker, the caretaker has regularly attended juvenile court hearings and has

information about the child unique from the other participants in the process, and future proceedings may result in an order permanently foreclosing any future contact with the child -- the de facto parent application should be liberally granted. (*Id.* at p. 1358.)

In denying grandparents' motion for de facto parent status in the instant case, the court made the following statement: "You know what's really sad that two people who seem like nice people have managed to produce four children that are so criminally involved. One child [D.U.'s father] sits before us in state prison now, a young man. The other child, the entire family not one person at that meeting of that family's -- aunts, the daughters, the parents said, 'Maybe he ought to surrender himself to the law.' In fact what everybody did instead is to make sure he got to Mexico. Two of those daughters paid the price for that and had to plead -- recently pled guilty to their behavior in that matter. Four out of four children, criminal behavior . . . but to raise children to be criminals when all of those children end up in the criminal system, there's something very wrong in that home. I don't know what's wrong in it, but I'm not repeating the process."

The court's statements indicate that all of grandparents' children are criminals. The record does not support this conclusion. According to the probate investigator's report attached to grandparents' motion, D.U.'s father was in prison for committing a lewd act with a minor under the age of 14, uncle was charged with murder, and one of grandparents' daughters was incarcerated for aiding her brother, uncle, in fleeing by driving him to the border. There is no evidence she has any other criminal history. There

is also no evidence that grandparents' other daughter has any criminal record. In fact, after investigating her for placement purposes, DPSS placed D.U. with her.

The DPSS argues that the evidence showed that grandparents failed in their parental responsibilities because D.U. was living in a household that fostered criminal behavior. This appears to be based on the court's assumption that grandparents are to blame for their grown children committing crimes; that the manner in which grandparents raised their children was the cause of their unlawful behavior.

Perhaps there was something wrong in the home but the juvenile court acknowledged it did not know what it was nor do we. There simply is no evidence that grandparents have been providing D.U. with a bad home environment. The evidence in the record indicates the contrary is true. To assume grandparents are the problem, as opposed to other external influences, is pure speculation.

The court's comments also indicate that the court based its ruling denying de facto parent status on the court's determination that D.U. should not be placed with grandparents. The juvenile court stated during the hearing on grandparents' motion for de facto parent status that, "[Grandparents] meet the De Facto Parent criteria in the first step, said they took care of her and helped themselves out and she regard [*sic*] that to be her home. They don't meet it on the second step. I cannot find that it's in [D.U.'s] best interest to remain in a home with this kind of criminal activity involved with all the siblings, and it's sad, because as I said, they seem like nice people, to argue that he's in Mexico and is no longer a danger when the family help [*sic*] put him there, I find a terribly disingenuous argument. In any event, the De Facto Parent Motion is denied."

This indicates that although the court found grandparents met the criteria for de facto parent status, the court denied grandparents' motion because it was not in D.U.'s best interest to live in grandparents' home. However, whether it is in D.U.'s best interest to be placed with grandparents is not an appropriate consideration when ruling on de facto parent status. The issue is whether an applicant seeking de facto parent status has a right to participate in the post-jurisdiction proceedings due to the applicant's past parental relationship with the child. (*In re Jody R.* (1990) 218 Cal.App.3d 1615.)

We fail to see the relevance of any of the factors relied on by the juvenile court in denying grandparents' motion for de facto parent status. Under *In re Jacob E.* (2004) 121 Cal.App.4th 909, 919, "The decision to grant de facto parent status turns on the facts of each case. Although the Supreme Court has not set forth specific guidelines for a juvenile court to apply in determining de facto parent status, courts have generally considered such factors as whether '(1) the child is 'psychologically bonded' to the adult; (2) the adult has assumed the role of a parent on a day-to-day basis for a substantial period of time; (3) the adult possesses information about the child unique from other participants in the process; (4) the adult has regularly attended juvenile court hearings; and (5) a future proceeding may result in an order permanently foreclosing any future contact between the adult and the child. [Citations.]' (*In re Patricia L.* (1992) 9 Cal.App.4th 61, 66-67, 11 Cal.Rptr.2d 631.)"

As the California Supreme Court noted in *In re Kieshia E., supra*, 6 Cal.4th at p. 78, "the key to the privileged status of de facto parenthood is adherence to 'the role of

parent,' both physical and psychological. (11 Cal.3d 679, 692- 693; see also Cal. Rules of Court, rule 1401(a)(4).)"

In the instant case, all five factors have been established. D.U. is psychologically bonded to grandparents. She lived with them most of her life; since she was 10 months old until the DPSS removed her at the age of five. Even when she did not live with grandparents during her first 10 months, grandparents cared for her during the night hours and then dropped her off with mother in the morning when grandparents went to work. D.U. also has consistently expressed a desire to return to her grandparents' home. After D.U. was removed from grandparents' home, grandparents made every effort to retain the close bond they have shared with D.U. by visiting and calling D.U. as frequently as was permitted.

In addition, as D.U.'s primary caretaker for most of D.U.'s life, grandparents assumed the role of D.U.'s parent on a day-to-day basis for a substantial period of time. As a consequence of grandparents parenting D.U. for over four years, up until shortly before the DPSS initiated the instant juvenile dependency proceedings, grandparents possess unique information about D.U. that other participants in the proceedings might not possess. Grandparents have also attended every juvenile court hearing, and have retained their own private attorney for the purpose of asserting their interests and regaining custody of D.U.

As to the fifth factor, future proceedings may result in an order permanently foreclosing any future contact between the adult and the child. While currently D.U. is

living with a paternal aunt, it remains possible that grandparents could be prevented from seeing D.U. and from D.U. ever again living with them.

Grandparents have established all five factors supporting de facto parent status. There is overwhelming evidence in the record that grandparents held both a physical and psychological role throughout D.U.'s life. The juvenile court therefore abused its discretion in denying grandparents' motion for de facto parent status.

DPSS acknowledges in its respondent's brief that the juvenile court found grandparents met the criteria for de facto parent status but the court denied the motion because it was not in D.U.'s best interests to grant grandparents' de facto parent status and place D.U. in their home. DPSS thus concludes denial of the motion was not an abuse of discretion.

Citing *Jacob E.* and *Michael R.*, DPSS argues that the court may rely on factors, other than those normally considered in determining de facto parent status, to deny de facto parent status. DPSS's reliance on *Jacob E.* and *Michael R.* is misplaced. In *Michael R.*, the court noted that, when determining de facto parent status, the court may "consider whether the person applying for de facto parent status has committed a 'substantial harm' to the child." (*In re Michael R.*, *supra*, 67 Cal.App.4th at p. 155.) In *Michael R.*, the court denied the grandmother de facto parent status even though she had been the child's caretaker for four months and had seen the child on a daily basis since he was born. The court found that the grandmother had inflicted substantial harm on the child by not protecting him from his physically abusive father by defying visitation orders and by absconding with him to Texas.

In *Jacob E.*, the court concluded that although the grandmother had provided a home and cared for her grandson for five years, she did not establish that she had assumed the role of parent on a day to day basis, fulfilling the child's physical and psychological needs. The grandmother failed to comply with court orders concerning enrolling the child in school, scheduling medical and dental appointments, and ensuring the child maintain a relationship with his older brother. The court found that the grandmother neglected her parental responsibilities and therefore denied her request for de facto parent status.

In the instant case, there is no evidence grandparents did not protect D.U. in any way or that they caused substantial harm to D.U. Furthermore, there is no evidence in the instant case that grandparents defied any court orders. Despite their strong desire, no doubt, to have D.U. remain in their care, grandparents cooperated in every way possible with the DPSS, court, and police while persistently seeking D.U.'s return to their home through legal means.

DPSS argues *Jacob E.* and *Michael R.* are analogous because in the instant case grandparents failed to protect D.U. by not providing her with a safe environment. This alleged failure is premised in part on the assumption grandparents participated in a family meeting shortly after uncle committed murder and assisted uncle in disposing of the gun and absconding across the border. There is no evidence of this in the record. There is no evidence grandparents participated in such a meeting; that the meeting occurred at grandparents' home; that D.U. was present during the meeting; that grandparents assisted

in any way in disposing of the murder weapon or assisting uncle flee; or that their home was unsafe for D.U. after uncle absconded.

There is no reasonable basis for the juvenile court denying grandparents de facto parent status. “[A]bsent physical or sexual abuse, there ought to be a ‘very good reason’ for denying de facto parent status to a grandparent or other close relative who has cared for a dependent child for an extended period of time. (*Id.* at p. 1358, 62 Cal.Rptr.2d 224.)” (*In re Jacob E.* (2004) 121 Cal.App.4th 909, 920.) Here, there was no physical or sexual abuse, and DPSS has failed to show there was a “very good reason” for denying de facto parent status, or even a good reason for not returning D.U. to grandparent’s care. Because de facto parent status is liberally granted and because there is overwhelming evidence grandparents qualified for de facto parent status, the juvenile court abused its discretion in denying grandparents de facto parent status.

If grandparents’ motion for de facto status had been granted, they would have had the right to present evidence in support of their interest in having D.U. placed with them. (*In re Cynthia C.*, *supra*, 58 Cal.App.4th at pp. 1490-1491; Cal. Rules of Court, rule 1412(e).) The juvenile court did not permit grandparents to be heard and present evidence supporting placing D.U. back with them before making the disposition ruling. Because the court abused its discretion in denying grandparents’ de facto parent motion, it also abused its discretion in not allowing grandparents to be heard as to the disposition order and D.U.’s placement.

We therefore reverse the order denying de facto parent status and the disposition order, which should have been entered after granting grandparents de facto parent status and after permitting grandparents to be heard and present evidence on the matter.

Grandparents' remaining contentions that the juvenile court abused its discretion in denying grandparents a hearing on their section 388 motion, summarily denying their section 388 motion, and violating their rights asserted in their section 388 motion as D.U.'s temporary legal guardian, are moot since we conclude grandparents are entitled to de facto parent status and a new disposition hearing is necessary.

3. Disposition

The disposition order and orders denying grandparents status as de facto parents are reversed and all orders entered thereafter are vacated. The juvenile court is directed to enter an order granting grandparents' motion for de facto parent status and to hold a disposition hearing within 30 days to determine whether D.U. should be placed with grandparents.

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s/Gaut
J.

We concur:

s/Ramirez
P. J.

s/Hollenhorst
J.